



Battle Creek Zoning Board of Appeals

Staff report for the November 18, 2014 meeting

To: Zoning Board of Appeals
From: Christine M. Zuzga, Planning Manager/Zoning Administrator
Date: November 6, 2014
Subject: Appeal of Decision of the Zoning Administrator
A01-14 Massimino, 42 Fremont Street

Summary

This report addresses an appeal of a decision of the Zoning Administrator as it relates to the legal use of the property at 42 Fremont Street.

Background Information

The subject site is located in the R-2 One-Two Family Residential zoning district and is operating as a 10-unit boarding house, contrary to what is permissible in that zoning district. Since 1988, the property has been zoned R-2 One/Two Family Residential, which allows one and two family dwelling units, and *“rooming or boarding houses, provided that not more than four nontransient roomers or boarders are accommodated in one dwelling. The dwelling shall also house a resident individual or family who shall be responsible for property maintenance and be registered in conformity with [Chapter 1462](#) of the Building and Housing Code.”*

The Planning/Zoning department became aware of the potential violation after the City received complaints regarding the use of the property. At that time, the Code Compliance solicited the property owner for a rental registration and the property owner submitted a rental permit application stating the structure was “single-family” with “ten-boarders”. As with any inconsistencies in zoning and use of a property that we become aware of, the Planning/Zoning Department initiated a historical review of the zoning and uses of the property to determine if the 10-unit boarding house was legal nonconforming.

Historical Documentation

Historical documentation that the City has access to shows the historical use of the property as follows:

Date	Use of Property/Actions Taken	Source	Zoning District	Use Permitted?
Early 1970's	Use or property listed as “Care Home for the Mentally Retarded”	City Assessing	R-3B Multi-Family	Yes*
1977	Use or property listed as “Foster Care Home”	City Assessing	R-3B	Yes*
1984	“AFC medium group home”	State Records	R-3B	Legal

	license issued by the State			Nonconforming
1988	Rezoning of property		R-2 One/Two Family	
1990	State license for AFC renewal	State Records	R-2	Legal Nonconforming
1993	State license for AFC renewal – Inspection by State approved	State Records	R-2	Legal Nonconforming
1996	New AFC license submitted to the state, w/drawn 1997		R-2	Legal Nonconforming
1997	State license for AFC closed	State Records	R-2	Legal Nonconforming Lost
2003	“# Roomers – 10”	Rental Registration	R-2	Not permitted
2013	“10 Boarders”	Rental Registration	R-2	Not permitted

*Zoning allowing large group adult foster care homes was adopted into ordinance in 1977. Prior to this, the zoning ordinance did not specifically address these uses. Once the ordinance was adopted, existing facilities became legal nonconforming.

City Assessing records indicate the property being used as an adult foster care home with notes made in the early 1970's and 1977. The documentation from the State indicates the original application for the Mohny AFC Home was dated on or around 5/1/1984 and lists renewal licenses for this facility issued in 1990 and 1993. Furthermore, there was an inspection for an adult foster care license in 1993 which was approved by the State. The documentation states “closed facility – licensed” in 1997. An additional document indicates an application to the State for an Adult Foster Care license for Choicecare Li Inc. dated 1/29/96 for this same property. A note in the State files indicates the application was withdrawn for lack of interest on 3/10/1997. Therefore, State records indicate a continuously licensed adult foster care facility from 1984 to 1997.

In addition to the above information, staff reviewed Polk Directories for additional information. These are not typically used as stand-alone support or denial of a land use because the accuracy can be questionable, however, they are consulted to try and determine trends in ownership and occupancy. For this property, Polk Directories reference “foster care home” in 1978 and refer to “adult foster care home” intermittently up through 1994.

Determination by Zoning Administrator

Staff has determined that the documentation from the State and the City that indicates the use of a continuously licensed adult foster care facility at 42 Fremont Street until 1997 to be a reliable and accurate reflection of the historic use of the property. The adult foster care facility would have been legal nonconforming as large group adult foster care facilities were permitted only by special use permit. Once this legal nonconforming use ceased to exist in 1997 as indicated on the State licensing paperwork, the property was to have been used in conformance with the zoning district in which it is placed. The withdrawal of the application for the Choicecare license and discontinuance of the Mahoney AFC facility shows an intent to abandon that legal nonconforming use by the property owner.

As stated above, the R-2 One/Two Family zoning district permits one and two family residential uses and other uses not applicable here. The zoning district also permits boarding/rooming houses with not

more than 4-boarders. The property owner was given an order to comply, which resulted in their appeal to the Zoning Board of Appeals

Rebuttal by Property Owner/Legal Counsel

The property owner has retained attorney Nelson Karre to represent him on this matter; correspondence from the attorney is attached to this staff report. Essentially, the basis of their appeal is their stance that this property has been used a boarding house since before 1988 (when the rezoning occurred) and that the use of a boarding house is legal nonconforming.

The appeal attempts to blur the lines between an adult foster care use and a boarding house. Please note there is a distinct difference between a boarding house and an adult foster care. Each of these uses are defined separately in our zoning ordinance, State law, and case law.

- A boarding house is a structure where rooms are leased to individuals for independent living situations. The boarder leases a bedroom and shares in other common household spaces (kitchen, common bathrooms, living areas). There are no other services provided to the boarder. A rooming house is essentially the same as a boarding house; however meals would also be provided to the occupant.
- An adult foster care is defined as “the provision of supervision, personal care, and protection in addition to room and board for 24 hours a day, 5 or more days a week, and for 2 or more consecutive weeks for compensation.”

The basis for their appeal includes a number of personal statements regarding the use of the property; however there are no official documents submitted that verifies the use of the property as a legal conforming boarding house. A number of statements indicate the use of the property by occupants, but they cannot certify how the property was operated. In fact one letter, from Judith Bostwick, states the house was “immediately licensed upon purchase” in 1971 and “has operated from that time on and still continues to provide this service”. Additionally a letter from Kelly Frey states she worked at the home, “a Room and Board and Foster Care Home” starting in 1986.

The appeal also is claiming that regardless of the adult foster care licensing they were operating a boarding house. Again, there are no documents to support their claims. In fact, the State licensing documents state the property had a continuous adult foster care facility at this property, supported by inspections performed and approved by the State.

They are also citing that the City knew about the use as a boarding house and therefore it should be allowed. Knowledge of an unlawful use does not imply or require approval. For reference, the rental registration process outlined in ordinance only started requiring zoning review in 2008; recent amendments in 2011 removed the provision for zoning review.

Action of the Zoning Board of Appeals

The burden to prove a legal nonconforming use is on the property owner, and it is my opinion that they have failed to prove that the legal nonconforming use of the property is a 10-unit boarding house.

State enabling legislation, and the local ordinance Chapter 1234 outlines one responsibility of the Zoning Board of Appeals is to hear and decide appeals from and review any administrative order, requirement, decision, or determination made by an administrative official or body charged with enforcement of this zoning ordinance. Therefore, it is the responsibility of the Zoning Board to determine if the evidence supplied by the City supports the position that the legal nonconforming use of the property was for an adult foster care facility, and that the property lost this legal nonconforming use when they voluntarily stopped the adult foster care license and voluntarily withdrew the most recent application for an adult foster care license in 1997.

Attachments

The following information is attached and made part of this Staff Report.

1. Determination by Zuzga
2. State of Michigan DHS records
3. City of Battle Creek Assessing records
4. Appeal packet submitted by Karre